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No. 04-473

IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 56 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The case concerns speech on a matter of public concern by a public employee to his supervisors. The public employer defendants maintain that the speech in question—as speech by the employee in the course of performing his employment duties—is not entitled to the First Amendment protection of public employee speech defined in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The First Amendment applies generally to speech by public employees as well as to speech by members of the general public. But, as *Pickering* holds, public employee speech may be subject to restraints that would be impermissible if applied to speech by members of the general public. Under *Pickering*—which strikes the balance between the free speech interests of public employees and the performance interests of governmental employers—to justify restraints on public employee speech, the government must show that the restraints are reasonably related to promoting the efficiency of governmental functions performed through its employees.

The public employer defendants' position that the First Amendment does not cover speech by a public employee in the course of performing his employment duties cannot be squared with the *Pickering* decision most closely in point—*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). *Givhan* held that criticism of school policies and practices voiced by a teacher in a private meeting with the school's principal were protected by the First Amendment. *Givhan* thus clearly establishes that speech by a public employee to her superiors at the workplace is covered by the First Amendment.

The public employer defendants' argument in support of their position—that public employee speech in the course of performing job duties must be categorically excluded from First Amendment protection so that the government can effectively convey its messages to an outside audience

through its employees—fails. The *Pickering* balancing test accounts for this "government speech" interest. Under *Pickering*, a government employer may restrain public employee speech in the interest of ensuring that the government's message is properly conveyed. But no such "government speech" interest is implicated where—as in this case—the public employee speech in question is addressed to the government itself and not to an outside audience.

ARGUMENT

Richard Ceballos, a deputy district attorney in the Los Angeles County District Attorney's Office, brought this § 1983 action alleging "that he was subjected to adverse employment actions by his supervisors . . . in retaliation for engaging in speech protected by the First Amendment." Pet. App. 1. In particular, Ceballos alleges that he was retaliated against for preparing and submitting to his supervisors a memorandum setting forth a summary of Ceballos's investigation into charges that a deputy sheriff's search warrant affidavit contained false statements and stating Ceballos's conclusion that the affidavit was falsified and his recommendation that the related prosecution be dismissed. Pet. App. 54-55.[2]

The defendants—the Los Angeles District Attorney and Ceballos's two supervisors—joined issue with Ceballos's § 1983 complaint by moving for summary judgment on the theory that speech by a public employee carrying out his "duties of employment," Pet. Br. i, is not speech protected by

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[2] As the law required, Ceballos informed defense counsel of his conclusion that the warrant affidavit contained false statements and testified in response to the defendant's subpoena at a hearing on the motion to suppress the warrant. Pet. App. 4. The defendants do not contend that Ceballos's compliance with his legal obligations in these two respects could justify any adverse employment action against him. Hence the extent to which the First Amendment protects these two communications is not an issue in this case.

the First Amendment. The district court agreed and dismissed Ceballos's § 1983 claim on the ground that "speech engaged in not merely as a concerned citizen but within the scope of the plaintiff's employment" is not entitled to First Amendment protection. Pet. App. 62.

Applying this Court's First Amendment precedents on public employee speech, the court of appeals rejected that categorical defense, reversed the district court's grant of summary judgment in favor of the defendants, and remanded the case for further proceedings. The court of appeals was correct to do so, as we now show.

I. It facilitates analysis of the Petitioners' argument for a categorical exception to First Amendment protection of public employee speech to begin by summarizing the general principles established by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny.

In the *Pickering* line of cases, the Court started from the basic proposition that "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." *City of San Diego v. Roe*, 543 U.S. ___, 125 S.Ct. 521, 523 (2004). And, based on that proposition, "[t]he Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." *Ibid.*

At the same time, the Court has also recognized "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. To vindicate these special interests, the Court has held that "a governmental employer may impose certain restraints on the speech of its

employees, restraints that would be unconstitutional if applied to the general public." *City of San Diego*, 125 S.Ct. at 523.

In her opinion for the plurality in *Waters v. Churchill*, 511 U.S. 661, 671 (1993), Justice O'Connor provided the fullest explanation of "[w]hat i[t] i[s] about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large":

> "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. * * *
>
> "The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 674-675.

Against that background, "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test." *City of San Diego*, 125 S.Ct. at 524-525. The *Pickering* test "requires a court evaluating restraints on a public employee's speech to balance 'the interests of the [employee], as a citi-

zen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* at 525, quoting *Pickering*, 391 U.S. at 568.

Under *Pickering*, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick v. Myers*, 461 U.S. 138, 150 (1983). And, "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152.

Moreover, "[i]n performing the [*Pickering*] balancing, the [public employee's] statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Among the "pertinent considerations [are] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationship for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with regular operation of the enterprise." *Ibid.* "These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Ibid.*

II. It is the Petitioners' position that, as a categorical matter, the *Pickering* First Amendment protections do not reach public employee "speech engaged in during the normal course and scope of employment, in accordance with the duties of employment." Pet. Br. 27. That position suffers from two fatal flaws.

A. First, the *Pickering* case most closely in point—*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)—cuts directly against the Petitioners' position.

In *Givhan*, "a junior high English teacher" was discharged for "privately express[ing] her complaints and opinions to the [junior high school] principal" concerning "employment policies and practices at [the] school which [the teacher] conceived to be racially discriminatory in purpose or effect." 439 U.S. at 411 & 413. The *Givhan* Court unanimously rejected the proposition that the teacher was not entitled to *Pickering* First Amendment protection, holding instead that *Pickering* does protect the speech of a "public employee who arranges to communicate privately with his employer." *Id.* at 415.

A workplace meeting at which a public employee privately discusses with her supervisor the public employer's employment policies and practices is, to use the Petitioners' phrase, most certainly "speech engaged in during the normal course and scope of employment, in accordance with the duties of employment." Pet. Br. 27. And, *Givhan* squarely holds that such public employee speech *is* entitled to *Pickering* First Amendment protection. The *Givhan* Court emphasized that point by stating that "striking the *Pickering* balance . . . may involve different considerations" when "a government employee personally confronts his supervisor" as opposed to "speak[ing] publicly." 439 U.S. at 415 n. 4.

The lesson of *Givhan* is that *Pickering* First Amendment protection is *not* confined to instances in which the public employee, acting outside the course and scope of employment, "spreads his views before the public." 439 U.S. at 416. The *Pickering* balancing test also protects "the public employee who arranges to communicate privately with his employer," *id.* at 415, on employer policies and practices of public concern.

That being so, under *Pickering*, the First Amendment's protections apply not only to Givhan's speech to her employer at a workplace meeting on allegedly discriminatory employment practices but to Ceballos's preparation and

submission to his supervisors of the memorandum on the allegedly false search warrant affidavit. For in both instances, the public employee is addressing his superiors on a matter of public concern.

B. The second flaw in the Petitioners' position is that their supporting arguments do not come close to justifying their proposed categorical exception to *Pickering*'s First Amendment protection of public employee speech..

The Petitioners' essential argument is that "public employees necessarily speak on behalf of the government when they engage in routine, job-required speech" and it follows that "such speech (expressed *on behalf* of the government) should not give rise to actionable First Amendment claims *against* the government." Pet. Br. 32 (emphasis in original). Supporting the Petitioners' position, the United States puts this point as being that "'the government is entitled to control the content of the speech' because it is the government's message that is being conveyed and the government has in effect '"purchased" the speech.'" U.S. Br. 20 quoting *Urofsky v. Gilmore*, 216 F.3d 401, 408 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

(1) To begin with, the Petitioners' argument does nothing to advance their position in the present class of cases. While there is no question that "when the [government] is the speaker, it may make content-based choices" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted" by those it employs to deliver that message, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-834 (1995). *See Legal Services Corp. v. Velazquez*, 532 U.S. 533, 540-542 (2001).

A public employee is self-evidently *not* engaged in delivering the government's message when, in the employment setting, he states his own views to his supervisors on what the

government's message or actions should be. Nor is such an employee addressing an audience that the government seeks to reach with a government message. Rather, the employee is delivering a message of his own to the appropriate internal government audience. Thus, the argument that First Amendment protection should be denied to such public employee speech in furtherance of the government's interest in controlling speech conveying the government's message fails at its premise.

In contrast, there is every reason to accord *Pickering* First Amendment protection to public employee speech on a matter of public concern addressed to an appropriate internal government audience.

Pickering's precise point is "to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384. Thus, this Court has repeatedly "held that government workers are constitutionally protected from dismissal . . . for publicly or privately criticizing their employer's policies." *Board of Commissioners v. Umbehr*, 518 U.S. 668, 674-675 (1996) (citations omitted).

As *Givhan* shows, and as this case indicates, public employee speech on a matter of public concern addressed to an appropriate internal government audience warrants and needs that protection.

(2) Given the variegated nature of public employee speech on the government's behalf to an outside audience and the substance of the *Pickering* First Amendment protection, the Petitioners' "government speech" argument does not advance their categorical position even in the class of cases that *does* involve such public employee speech—a class of cases that that is entirely distinct from the instant case. *See* p. 3, n. 2, *supra*.

The *Pickering* balancing test provides that "a governmental employer may impose certain restraints on the speech of its employees" in order "to protect its own legitimate interests in performing its mission." *City of San Diego*, 125 S.Ct. at 523 & 524. Conveying the government's message accurately and effectively to the public is part of that mission. And, the *Pickering* balancing test most certainly permits government restraints on public employee speech in the service of assuring that the public employee assigned to convey a government message carries out that assignment properly.

The *Pickering* test thus fully and properly serves the government's legitimate interests in this regard. Equally to the point, the Petitioners' categorical position is both unnecessary to serve any legitimate government interest and a position that cuts too deeply into the important free speech interests recognized in *Pickering*.

In many instances, public employee speech to an outside audience involves communicating both a message defined by the government and a message that of necessity is defined by the public employee speaker. And, where such speech is at issue, the Petitioners' categorical exception to *Pickering* First Amendment protection would enable "public employers [to] use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384.

(3) The Petitioners embellish their "government speech" argument with the claim that "allowing any and all routine, job-related speech to act as the basis for an actionable First Amendment claim" will have "a widespread chilling effect on necessary and appropriate employment actions." Pet. Br. 36 & 38. This is hyperbole.

"[N]ecessary and appropriate employment actions" are, of course, precisely what the *Pickering* balance is intended to allow. That being so, the Petitioners' claim is not based on

any showing that unwarranted adverse judgments have been or are likely to be obtained. Rather, the Petitioners' point is that "such [necessary and appropriate employment] actions could be linked (by allegation) to a prior instance of routine, job-required speech," *id*. at 38, and that "such a claim would not be subject to dismissal at the pleading stage [so that] the defendant . . . would have to wait until the summary judgment stage, at the very least, to obtain dismissal of the claim," *id*. at 36. That is not a point of any substance.

A defendant may move for summary judgment at any time. Rule 56(b), Fed.R.Civ.P. Thus, as a general matter, summary judgment provides a sufficiently expeditious procedure to "permit the resolution of many insubstantial claims" in a manner that "avoid[s] excessive disruption of government" through drawn out litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Beyond that, we would add that the categorical rule advocated by the Petitioners is more likely to complicate than it is to simplify First Amendment litigation in this area. In all events, as the United States recognizes, *Pickering*'s First Amendment protection clearly extends to speech "related to the public employee's job and communicated at the workplace." U.S. Br. 18. And, to the "public concern" threshold articulated in *Connick v. Myers, supra*, the Petitioners would add a second, outside-the-scope-of-employment threshold before reaching the *Pickering* balancing process. But, the determination when job-related workplace speech is with-in or without a public employee's scope of employment will, in many instances, not be easy.

Thus, erecting a second hurdle that must be cleared before the trial court can get on with the *Pickering* balancing test will not simplify the disposition of meritless claims. Rather, it will simply multiply the preliminary determinations that must be made befo the real merits of the plaintiff's First Amendment claim can be reached.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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